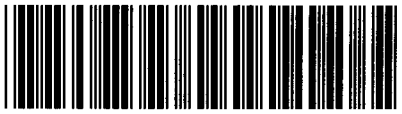

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PETITION OF BLUEBERRY HILLS WATER WORKS, LLC APPEALING A DECISION BY THE CITY OF BEEVILLE TO CHANGE WHOLESALE WATER RATES	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

FILING CLERK

CITY OF BEEVILLE'S OBJECTIONS TO BLUEBERRY HILLS' EVIDENCE IN SUPPORT OF INTERIM RATES AND MOTION TO STRIKE

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES, the City of Beeville ("Beeville"), the responding wholesale water supplier in the above styled and docketed matter, and subject to its plea to the jurisdiction, files its Objections To Blueberry Hills' Evidence In Support Of Interim Rates And Motion To Strike. This Response is timely filed. In support of its objections and motion to strike, Beeville would respectfully show the following:

I. LATE FILING

Beeville objects to offer of "business records" of Robert H. Thonhoff, Jr. P.E. and Linda Unger attached as Exhibit A and Exhibit B to Petitioner's Brief and Evidence in Support of Petitioner's Motion for Interim Water Rate Order filed April 24, 2015, and incorporated by reference hereto. Even if the affidavits were "business records," which neither are, the evidence was not timely submitted. Under TEX. R. CIV. EVID. 902(10), business records must be submitted to each party at least fourteen days before the hearing. Petitioner served the alleged business records on Beeville on April 24, 2015, seven days prior to the April 30, 2015 hearing. Further, these records were not even created fourteen days prior to the hearing. The Thonhoff affidavit is dated April 22, 2015 and the Thonhoff letter is dated April 21, 2015. Likewise, the Unger affidavits were dated April 23, 2015. Petitioner served its alleged business records on Beeville late.

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II. NOT BUSINESS RECORDS

Beeville objects to Petitioners offer of "business records" of Robert H. Thonhoff, Jr. P.E. and Linda Unger attached as Exhibit A and Exhibit B to Petitioner's Brief and Evidence in Support of Petitioner's Motion for Interim Water Rate Order filed April 24, 2015. Some of the documents attached to the affidavits are not business records under TEX. R. CIV. EVID. 902(10). In order to be business records, the petitioner must show the following: (1) the record is a memorandum, report, or other compilation of data, (2) the witness is the custodian or another qualified witness, (3) the record was made from information transmitted by a person with knowledge of the facts, (4) the record was made at or near the time of the acts, events, conditions, opinions, or diagnoses appearing on it, (5) the record was made as part of the regular practice of that business activity, and (6) the record was kept in the course of a regularly conducted business activity. *See* TEX. R. CIV. EVID. 101(h)(4), 803(6)(A)-(D).

A. The Thonhoff report (Bates 0002 and 0003) does not qualify as business records of Thonhoff Consulting Engineers. Petitioner is impermissibly attempting to introduce expert testimony by alleging the letter was created in Mr. Thonhoff's regular course of business. On its face, Mr. Thonhoff's letter to the Petitioner's attorney is an attempt to convey an opinion which has been elicited by an outside source with a pecuniary interest, which is an impermissible use of the business records hearsay exception. *See Freeman v. American Motorists Ins.*, 53 S.W.3d 710, 715 (Tex.App.—Houston [1st Dist.] 2001, no pet.) (letter from doctor to P's attorney about P's condition was inadmissible as business record because it did not qualify as a routine entry because it was an attempt to convey an opinion elicited from an outside source with a pecuniary interest), *see also, Texas Employer's Insurance Association v. Sauceda,* 636 S.W.2d 494, 498 (Tex.App.—

San Antonio 1982, no writ) (doctor's letter to the insurance carrier was inadmissible as a business record because it did not qualify as a routine entry in the claimant's medical history).

B. Similarly to Mr. Thonhoff's records, the affidavit of Ms. Unger and the records attached to the affidavit clearly do not qualify as business records.

i) Affidavit by Ms. Unger, (Bates 00012-00013) is clearly not a business record, as it is also an attempt to convey an opinion elicited by an outside source, which is an impermissible use of the business records hearsay exception. *See Freeman v. American Motorists Ins.*, 53 S.W.3d 710, 715 (Tex.App.—Houston [1st Dist.] 2001, no pet.), *see also, Texas Employer's Insurance Association v. Sauceda,* 636 S.W.2d 494, 498 (Tex.App.—San Antonio 1982, no writ). This affidavit is also hearsay within hearsay.

ii) Cumulative general ledger (Bates 00031-00043) which appears to be a summary of other records. To introduce a summary, a party must prove the following: (1) the chart, summary, or calculation is a summary of other records, (2) the other records are voluminous writings, recordings, or photographs that are admissible, (3) the other records cannot be conveniently examined in court, and (4) the other records were made available to the other party for inspection and copying. *See* TEX. R. CIV. EVID. 1006. There is no allegation or proof regarding who, when, or how the cumulative general ledger was prepared. Further, there is no showing of what records were summarized, if they were voluminous, or if the records themselves are admissible evidence. This is an impermissible attempt to use the business records exception to circumvent the rules for a summary record.

III. DAUBERT/ROBISON CHALLENGE

A. Generally.

Beeville further objects to the portion of the affidavits of Mr. Thonhoff and Ms. Unger and the letter of Mr. Thonhoff on the basis that they appear to be expert opinions, and Petitioner did not provide any evidence regarding the admissibility of the statements as expert testimony. There are four tests for the admissibility of expert testimony: qualifications, knowledge, helpfulness, and foundation data. *See* TEX. R. CIV. EVID. 702 and 705(a), *see also Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex.2009). The first test is whether the witness is qualified by education or training to give an expert opinion, and if not, whether the witness is otherwise qualified by specialized knowledge, skill, or experience. The knowledge test requires a finding that the subject of the testimony must be "scientific, technical, or other specialized knowledge." TEX. R. CIV. EVID. 702; *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex.2001). An expert cannot offer an opinion based on a discipline that itself lacks reliability (e.g., astrology). *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999). The helpfulness test requires a finding that the knowledge must "help the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. CIV. EVID. 702; *e.g., K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360-61 (Tex.2000). Finally, the foundation test requires a finding that the expert's opinion must be based on sufficient "underlying facts or data." TEX. R. CIV. EVID. 705(c); *see* TEX. R. CIV. EVID. 703 (basis of opinion testimony by expert). In *Daubert*, the Supreme Court provided several "general observations" of factors for the court to consider when evaluating the reasoning or methodology underlying the expert's testimony.[1] The *Daubert* factors are essentially the starting point for the analysis of

[1] *Daubert*, 509 U.S. at 593.

whether an expert's opinions are reliable.[2] The facts that the court should consider when evaluating reliability are the following: (1) testing; (2) potential rate of error; (3) peer review and publication; (4) general acceptance; (5) sufficiency of facts; and (6) other factors.[3] The Supreme Court has made it clear that the district court can consider other factors when appropriate to ensure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[4] More specifically, the court should consider whether the expert has adequately accounted for alternative explanations.[5] Likewise, where the conclusion of an expert does not follow from the data, a district court is free to determine that an impermissible analytical gap exists between premise and conclusion.[6]

B. Thonhoff report.

The Thonhoff report and the attachment are offered as a business record of Thonhoff Consulting Engineers. As discussed above, it isn't a business record. Nor should this report be accepted as an expert opinion. The only evidence of expert qualification is the conclusory statement in the Thonhoff affidavit (Bates 00001) that he is "qualified on the basis of his training and experience." Further, there is no supporting evidence, data, or document supporting the foundation of Mr. Thonhoff's opinion to guide the Administrative Judge in his/her determination of whether the opinion is reliable. Further, Mr. Thonhoff's report speculates as to future rates within Petitioner's service area. Any increases in Petitioner's rates are subject to the approval of the PUC.

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[2] *See Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002).

[3] *Daubert*, 509 U.S. at 593-94.

[4] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

[5] *See Claar v. Burlington N.R.R.*, 29 F.3d 499, 502 (9th Cir. 1994); *see also Munoz v. Orr*, 200 F.3d 291, 301 (5th Cir. 2000) (expert must consider possible variables).

[6] *See Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 886 (10th Cir. 2005).

Therefore any opinions based on a future rate are mere speculation, and cannot meet the above referenced foundation test as they are entirely unreliable as being based on conjecture and not facts and data.

C. Unger Affidavit.

i) 2nd Paragraph. Ms. Unger concludes that "on the basis of my training and experience" she is qualified to offer an opinion on interim rates. But, Ms. Unger does not provide any evidence regarding her training or experience as predicate to being qualified to express an opinion on interim rates.

ii) 4th paragraph. Ms. Unger mischaracterizes Ordinance No. 2246 as mandating that petitioner increase water rates and litigate with Beeville at the PUC. Beeville's ordinance does not "mandate" a water rate increase or litigation with Beeville.

The remaining portion of the fourth paragraph expresses a speculative opinion on future rates within the petitioner's service area and within Beeville. These opinions are mere speculation, and cannot meet the above referenced foundation test as it is entirely unreliable as being based on conjecture and not facts and data. Further, there is no predicate for this opinion.

iii) 5th paragraph. This paragraph repeats the conclusory statements regarding the effect of the rates, but provides no evidence explaining the foundation for these opinions.

IV. CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Beeville respectfully requests the Administrative Law Judge to sustain these objections and strike both of the business records affidavits submitted by the Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent by via hand delivery, facsimile, electronic mail, overnight mail, US mail and/or Certified Mail Return Receipt Requested to the following persons on this 27th day of April, 2015:

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